

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANA GILBERT, on behalf of herself)	Case No. 08-0385 SC
and all others similarly situated,)	
	ORDER GRANTING IN
Plaintiff,)	PART AND DENYING IN
	PART PLAINTIFF'S
v.)	MOTION FOR
	CONDITIONAL
CITIGROUP, INC., CITIBANK, N.A.,)	CERTIFICATION AND
	<u>FACILITATED NOTICE</u>
Defendants.)	
_____)	

I. INTRODUCTION

This matter comes before the Court on the Motion for Conditional Certification and Facilitated Notice submitted by Plaintiff Dana Gilbert. Docket No. 31. Defendants Citigroup Inc. and Citibank, N.A. (collectively "Defendants") filed an Opposition and Plaintiff submitted a Reply. See Docket Nos. 38, 59. For the following reasons, the Court GRANTS IN PART and DENIES IN PART Plaintiff's Motion.

II. BACKGROUND

Plaintiff worked for Citibank as a Business Banking Officer ("BBO") from October 2006 to November 2007. Gilbert Decl., Docket No. 33, ¶ 2. As a BBO, she sold Citibank's basic business products and services. Id. ¶ 7. Plaintiff worked in Citibank's Financial Centers in Pleasant Hill, California and Walnut Creek, California. Id. ¶ 3. Plaintiff was paid on a salaried basis from

1 October 2006 until approximately June 2007. Id. ¶ 4. Thereafter,
2 she was paid on an hourly basis. Id. Plaintiff contends that, by
3 paying a salary, Defendants misclassified her and other BBOs as
4 exempt employees and failed to pay overtime compensation in
5 violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §
6 201 et seq. See Second Am. Compl. ("SAC"), Docket No. 16, ¶¶ 55-
7 61. Plaintiff contends that when paid by the hour, Defendants
8 failed to pay her and other BBOs for hours worked "off-the-clock"
9 in violation of the FLSA. Id. ¶¶ 62-66. Plaintiff moves the
10 Court to conditionally certify her misclassification claim and her
11 "off-the-clock" claim as a collective action under the FLSA. Mot.
12 at 1.

13 14 **III. CONDITIONAL CERTIFICATION**

15 **A. Legal Standard**

16 Section 16(b) of the FLSA provides employees with a private
17 right of action to sue an employer for violations of the Act "for
18 and in behalf of himself or themselves and other employees
19 similarly situated." 29 U.S.C. § 216(b). To join an FLSA
20 "collective action" as a plaintiff, an employee must affirmatively
21 opt-in by filing a written "consent to join" in the court where
22 the action is pending. See id.

23 A majority of courts, including district courts in the Ninth
24 Circuit, have adopted a two-stage certification procedure for
25 collective actions brought under the FLSA. See, e.g., Thiessen v.
26 Gen. Elec. Capital Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001);
27 Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th

1 Cir. 2001); Escobar v. Whiteside Construction Corp., No. 08-1120,
2 2008 WL 3915715, at *3 (N.D. Cal. Aug. 21, 2008); Beauperthuy v.
3 24 Hour Fitness USA, Inc., No. 06-0715, 2007 WL 707475, at *5
4 (N.D. Cal. Mar. 6, 2007); Leuthold v. Destination Am., Inc., 224
5 F.R.D. 462, 466 (N.D. Cal. 2004). At the first stage, the
6 district court approves conditional certification upon a minimal
7 showing that the members of the proposed class are "similarly
8 situated"; at the second stage, usually initiated by a motion to
9 decertify, the court engages in a more searching review.
10 Beauperthuy, 2007 WL 707475 at *5.

11 The FLSA does not define "similarly situated," and the Ninth
12 Circuit has not spoken to the issue. The Supreme Court, in
13 Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989),
14 left the term undefined.¹ However, the Supreme Court indicated
15 that a proper collective action encourages judicial efficiency by
16 addressing in a single proceeding claims of multiple plaintiffs
17 who share "common issues of law and fact arising from the same
18 alleged [prohibited] activity." Id. Courts have distilled this
19 into the requirement that a proponent for conditional
20 certification present the court with "nothing more than
21 substantial allegations that putative class members were together
22 the victims of a single decision, policy, or plan." Thiessen, 267
23 F.3d at 1102 (internal quotations omitted); see also, e.g.,
24 Gerlach v. Wells Fargo & Co., No. 05-0585, 2006 WL 824652, at *2

26 ¹ Hoffmann-La Roche addressed a collective action brought
27 under the Age Discrimination in Employment Act, which, the Court
28 recognized, incorporates § 16(b) of the FLSA. 493 U.S. at 170.

(N.D. Cal. Mar. 28, 2006). Given that a motion for conditional certification usually comes before much discovery, and is made in anticipation of a later more searching review, a movant bears a very light burden in substantiating its allegations at this stage. See, e.g., Beauperthuy, 2007 WL 707475 at *5.

B. Collective Action is Appropriate

Plaintiff has met the burden for conditional certification of the collective action. Plaintiff and four other current or former BBOs submitted sworn declarations in support of the Motion. See Gilbert Decl.; Klein Decl.; Micuch Decl.; Owen Decl.; Perry Decl. Docket Nos. 33-37. These declarations show that Plaintiff and other BBOs employed at different locations throughout California shared the same or similar job responsibilities. See Gilbert Decl. ¶¶ 7-17; Klein Decl. ¶¶ 8-15; Micuch Decl. ¶¶ 7-15; Owen Decl. ¶¶ 8-16; Perry Decl. ¶¶ 8-16. Plaintiff also submitted a document indicating that BBOs throughout North America were subject to the same variable compensation plan. See Wynne Decl., Docket No. 32, Ex. 3 ("BBO Variable Compensation Brochure").

Plaintiff has provided evidence showing that she and other BBOs were subject to the same allegedly illegal company-wide policy - namely, Citibank's failure to pay overtime compensation to BBOs both before and after their reclassification. Around the middle of 2007, Defendants reclassified four of the five declarants.² See Gilbert Decl. ¶ 6; Klein Decl. ¶ 6; Micuch Decl.

² Brian Perry was not reclassified simply because he was no longer working for Citibank by the middle of 2007. See Perry Decl. ¶ 2.

¶ 4; Owen Decl. ¶ 4. Before the reclassification, they were paid a salary, and afterwards, they were paid by the hour. See Gilbert Decl. ¶ 4; Klein Decl. ¶ 4; Micuch Decl. ¶ 4; Owen Decl. ¶ 4; Perry Decl. ¶ 4. Four of the declarants state they worked overtime hours both before and after the reclassification. See Gilbert Decl. ¶ 5; Klein Decl. ¶ 5; Micuch Decl. ¶ 5; Owen Decl. ¶ 5. Brian Perry states he worked overtime hours during the time he was employed as a BBO at Citibank. Perry Decl. ¶ 5.

Defendants do not dispute that BBOs throughout the country were initially classified as exempt. Opp'n at 6. Defendants state that as part of an organizational restructuring, the BBO position was eliminated. Sebok Decl., Docket No. 40, ¶ 13; Phillips Decl., Docket No. 41, ¶ 9. Nationwide, BBOs were transferred to other positions in early to mid 2007.³ Sebok Decl. ¶ 13; Phillips Decl. ¶ 9. While Defendants vigorously dispute that the classification of BBOs as exempt was illegal, or that former BBOs were encouraged to work "off-the-clock" following their transfer to new positions, neither side contests that BBOs throughout the country were transferred to new positions around the middle of 2007. Based on this undisputed fact, coupled with Plaintiff's submission of five declarations and a document indicating BBOs were compensated in the same way nationwide, the Court concludes that Plaintiff has met her light burden of substantially alleging that BBOs were together the victims of a

³ While the declarants state they were reclassified around May or June 2007, Defendants state the organizational restructuring occurred in California in April 2007.

1 single decision, policy, or plan. See Escobar, 2008 WL 3915715 at
2 *3 (finding conditional certification warranted based on
3 allegations in complaint and statements in three declarations);
4 Leuthold, 224 F.R.D. at 468 (same); see also Ballaris v. Wacker
5 Siltronic Corp., No. 00-1627, 2001 WL 1335809 (D. Or. Aug. 24,
6 2001)(finding that affidavits of two employees were sufficient for
7 conditional certification).

8 In opposing the Motion, Defendants rely primarily on Trinh v.
9 JP Morgan Chase & Co., where the court denied a motion for
10 conditional certification because the plaintiffs failed to show
11 they were similarly situated to other members of the proposed
12 class. No. 07-1666, 2008 WL 1860161 (S.D. Cal. Apr. 22, 2008).
13 In Trinh, the two sub-prime loan officers who brought the suit
14 worked at JP Morgan for less than six months, only closed a single
15 loan between them, and were ultimately terminated for poor
16 performance and misconduct, respectively. Id. at *1. Despite the
17 fact that they briefly worked in only one office, and did not
18 submit declarations from any other sub-prime loan officers, the
19 plaintiffs sought to conditionally certify a class of all JP
20 Morgan loan officers throughout the country. Id.

21 Here, Plaintiff has filed declarations from four other BBOs
22 who worked in different branches throughout California, and each
23 worked for longer than one year. See Klein Decl. ¶¶ 2-3; Micuch
24 Decl. ¶¶ 2-3; Owen Decl. ¶ 2; Perry Decl. ¶¶ 2-3. While Perry
25 left Citibank before the reclassification, Plaintiff and the other
26 BBOs were reclassified around the middle of 2007, and they allege
27 they worked overtime hours both before and after being
28

1 reclassified. Plaintiff also submitted a document indicating that
2 BBOs are compensated in the same way throughout North America.
3 See BBO Variable Compensation Brochure. Unlike the evidence in
4 Trinh, the evidence here is sufficient to warrant conditional
5 certification.

6 The Court is not persuaded by the other cases cited in
7 Defendants' Opposition. Maddock v. KB Homes, Inc., 248 F.R.D. 229
8 (C.D. Cal. 2007) was decided under Federal Rule of Civil Procedure
9 23 rather than the lenient FLSA standard for conditional
10 certification. Defendants cite to cases where extensive discovery
11 had already occurred and that were decided under the more rigorous
12 second stage analysis. See, e.g., Pfohl v. Farmers Ins. Group,
13 2004 WL 554834 (C.D. Cal. 2004); Holt v. Rite Aid, 333 F. Supp. 2d
14 1265 (M.D. Ala. 2004); Basco v. Wal-Mart Stores, Inc., 2004 WL
15 1497709 (E.D. La. 2004). Defendants also tend to rely on cases
16 where there was no evidence to support conditional certification
17 beyond the allegations in the complaint. See, e.g., Haynes v.
18 Singer Co., 696 F.2d 884 (11th Cir. 1983); Harper v. Lovett's
19 Buffet, Inc., 185 F.R.D. 358, 363 (M.D. Ala. 1999).

20 Defendants contend that determining exempt status or
21 determining "off-the-clock" issues necessarily involves
22 individualized inquiries, which requires the Court to deny
23 conditional certification. Opp'n at 12-18. Defendants submit
24 numerous declarations showing how the job duties of BBOs varied
25 widely. See, e.g., Sebok Decl., ¶¶ 5-7, 13; Phillips Decl. ¶ 9,
26 Ilano Decl., Docket No. 42, ¶¶ 7, 9; Villamizar Decl., Docket No.

45, ¶¶ 7-9; Nolan Decl., Docket No. 46, ¶ 4.⁴ Defendants also argue that resolution of Plaintiff's "off-the-clock" claims would require testimony from numerous supervisors and employees. Opp'n at 16-18.

The Court finds that Defendants' concern about individualized inquiries does not require the Court to deny conditional certification. See Escobar, 2008 WL 3915715 at *5 (disagreeing with defendants' argument that FLSA claims require numerous individualized inquiries that render them inappropriate for conditional certification). Under the two-stage certification procedure, Defendants can present this evidence and make these arguments as part of a motion to decertify the class once discovery is complete. See Leuthold, 224 F.R.D. at 467. At that second stage of the certification procedure, the Court must make a factual determination regarding the propriety and scope of the class by considering the following factors: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendants with respect to the individual plaintiffs; and (3) fairness and procedural considerations. Id. At this first stage of the procedure, however, Plaintiff has met her burden of showing she is similarly situated to other BBOs for purposes of providing notice. The Court GRANTS Plaintiff's motion for conditional certification of the collective action.

⁴ Plaintiffs submitted evidentiary objections to many of Defendants' declarations. See Docket No. 61. Since the Court's Order does not rely on this evidence, the Court does not rule on Plaintiff's objections.

1 **IV. SCOPE OF PROPOSED COLLECTIVE CLASS**

2 **A. Geographical Limitation**

3 Defendants argue that if conditional certification is
4 granted, then the conditional class should be limited to BBOs who
5 worked in Citibank's Walnut Creek, Pleasant Hill, Concord, Fresno,
6 or San Diego branches, or in California at the outside extreme.
7 Opp'n at 18; Objections to Proposed Notice at 1. Defendants base
8 this request on the fact that Plaintiff has submitted declarations
9 from BBOs who worked in seven California branches only. Opp'n at
10 5. Defendants point out that, between February 2006 and April
11 2007, there were approximately 878 individuals in ten different
12 states and the District of Columbia who held the position of BBO
13 or BBO in training at Citibank. Opp'n at 4; McSherry-Knight
14 Decl., Docket No. 52, ¶ 5.

15 In Hoffmann-La Roche, the Supreme Court recognized the
16 discretion of district courts to facilitate the process by which
17 potential plaintiffs are notified of FLSA collective actions. 493
18 U.S. at 169-70. Exercising this discretion, the Court finds that
19 Defendants' proposed geographical limitations are not appropriate.
20 Defendants themselves concede that BBOs throughout the country
21 were transferred to new positions in early to mid 2007. See Sebok
22 Decl. ¶ 13; Phillips Decl. ¶ 9. Plaintiff submitted a document
23 indicating that BBOs throughout North America were compensated in
24 the same way. See BBO Variable Compensation Brochure. This
25 evidence in conjunction with five declarations from BBOs who
26 worked at seven California branches of Citibank is sufficient for
27 conditional certification of the proposed nationwide class. See

1 Adams v. Inter-Con Sec. Sys., Inc., 242 F.R.D. 530, 537-38 (N.D.
2 Cal. 2007)("For conditional certification, plaintiffs do not need
3 to provide evidence that every facility relevant to the proposed
4 class maintains an illegal policy . . . Rather, the named
5 plaintiff must demonstrate that there existed at least one
6 similarly situated person at a facility other than her own.").

7 **B. Temporal Limitation and Equitable Tolling**

8 Plaintiff seeks authorization for the mailing of a proposed
9 notice to "[a]ll Business Banking Officers and/or Trainees for the
10 Business Banking Officer position of Citibank, N.A. and/or
11 Citigroup, Inc. between January 22, 2005 to the present." Wynne
12 Decl. Ex. 1 ("Proposed Notice"). The statute of limitations for a
13 claim under the FLSA is two years, but if the violation is
14 willful, the statute of limitations is extended to three years.
15 See 29 U.S.C. § 255(a). Plaintiff therefore seeks to toll the
16 statute of limitations as of the date she filed her Complaint,
17 January 22, 2008. Although Plaintiff's Motion contains no
18 argument to support equitable tolling, Plaintiff contends in her
19 reply brief that equitable tolling is appropriate because
20 Defendants have unreasonably refused to provide any contact
21 information as to any potential class members. See Reply at 15.
22 Defendant objects to Plaintiff's effort to toll the statute of
23 limitations. See Opp'n at 21-22; Objections to Proposed Notice at
24 2-4.

25 "Equitable tolling applies when the plaintiff is prevented
26 from asserting a claim by wrongful conduct on the part of the
27 defendant, or when extraordinary circumstances beyond the

1 plaintiff's control made it impossible to file a claim on time."
2 Stoll v. Runyon, 165 F.3d 1238, 1242 (9th Cir. 1999). Federal
3 courts have typically extended equitable relief only sparingly.
4 Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990). Here,
5 Plaintiff has not alleged extraordinary circumstances, and
6 Defendants' refusal to provide contact information prior to
7 certification does not count as wrongful conduct. See Prentice v.
8 Fund for Pub. Interest Research, No. 06-7776, 2007 WL 2729187, at
9 *3-4 (N.D. Cal. 2007); Gerlach, 2006 WL 824652, at *2. The FLSA
10 does not require Defendants to provide contact information until
11 after the court certifies the collective action. See Adams, 242
12 F.R.D. at 543 (citing Hoffmann-LaRoche, 493 U.S. at 170).

13 The Court DENIES Plaintiff's request to authorize mailing
14 notice to BBOs who have been employed since January 22, 2005.
15 Defendants propose sending notice to BBOs who have been employed
16 since February 6, 2006, which is three years prior to the hearing
17 date for Plaintiff's Motion. See Objections to Proposed Notice at
18 3-4. The Court adopts Defendants' proposal.

19
20 **V. PRODUCTION OF CONTACT INFORMATION AND SOCIAL SECURITY NUMBERS**

21 To facilitate notice, Plaintiff requests that Defendants be
22 ordered to produce all last known addresses, residence telephone
23 numbers, cell phone numbers, email addresses, and social security
24 numbers of potential class members. Mot. at 18. Defendants
25 object to the request that they be ordered to produce confidential
26 employee information to Plaintiff and instead suggest that the
27 information be provided to a third-party notice administrator.

1 Opp'n at 22-3. Plaintiffs do not object to the use of a notice
2 administrator, but emphasize that social security numbers be
3 provided to facilitate skip-tracing of the class members'
4 addresses. Reply at 15.

5 Since both sides agree that use of a notice administrator is
6 appropriate, the Court orders the parties to meet and confer
7 within ten calendar days from the date of this order regarding the
8 appointment of a notice administrator. Plaintiff can appoint a
9 notice administrator acceptable to Defendants.⁵ Plaintiff is
10 responsible for all costs and expenses of the notice
11 administrator.

12 The Court orders Defendants to produce the names, addresses,
13 telephone numbers, and email addresses of potential class members
14 to the notice administrator. At this juncture, the Court will not
15 require Defendants to produce social security numbers. Plaintiffs
16 may move to compel production of social security numbers if this
17 contact information is not sufficient to provide notice to a large
18 percentage of the potential class members.

19
20 **VI. FORM OF NOTICE**

21 Defendants object to the case caption in the Proposed Notice.
22 Objections to Proposed Notice at 4. Plaintiff agrees to removal
23 of the case caption. Reply to Objections at 5. Defendants also
24 object to the date and signature block at the end of the Proposed

25
26 ⁵ Defendants suggest using Rust Consulting or Rosenthal &
27 Company LLC, who apparently are notice administrators Plaintiff's
28 counsel has used before. Opp'n at 24 n.25; see also Stecher Decl.,
Docket No. 55, ¶¶ 7-9.

1 Notice. Objections to Proposed Notice at 4. Both the case
2 caption and the signature block must be removed from the Notice.
3 Like the case caption, the signature block could also "give a
4 false impression of judicial endorsement of [Plaintiff's] position
5 where none exists." See Prentice, 2007 WL 2729187 at *5.

6 Defendants request that additional language be added to the
7 Notice stating that if an individual opts into the action, the
8 named Plaintiff will have the right to make decisions on behalf of
9 the opt-in Plaintiff concerning the litigation, and that those
10 decisions are generally binding. Objections to Proposed Notice at
11 4. The Court GRANTS Defendants' request. The additional language
12 should be added to Section V of the Notice, entitled "Effect of
13 Joining this Suit."

14
15 **VII. CONCLUSION**

16 For the reasons stated above, Plaintiff's Motion for
17 Conditional Certification and Facilitated Notice is GRANTED IN
18 PART and DENIED IN PART. The Court ORDERS as follows:

- 19 1. This action is certified as a collective action pursuant
20 to 29 U.S.C. § 216(b). Covered Employees include all
21 Business Banking Officers and/or Trainees for the
22 Business Banking Officer position of Citibank, N.A.
23 and/or Citigroup, Inc. between February 6, 2006 to the
24 present.
- 25 2. The parties shall meet and confer within ten (10)
26 calendar days from the date of this order regarding the
27 appointment of a notice administrator. Plaintiff can
28

1 appoint a notice administrator acceptable to Defendants.
2 Plaintiff will be responsible for all costs and expenses
3 of the notice administrator.

4 3. Defendants shall provide the names, addresses, telephone
5 numbers, and email addresses of potential class members
6 to the notice administrator within thirty (30) days of
7 the appointment of the notice administrator.

8 4. The caption and signature block shall be removed from
9 the Proposed Notice, and additional language shall be
10 added stating that if an individual opts into the
11 action, the named Plaintiff will have the right to make
12 decisions on behalf of the opt-in Plaintiff concerning
13 the litigation, and that those decisions are generally
14 binding.

15
16 IT IS SO ORDERED.

17
18 Dated: February 18, 2009



UNITED STATES DISTRICT JUDGE